



**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
DIVISION OF WATER POLLUTION CONTROL  
401 Church Street  
L&C Annex 6th Floor  
Nashville, TN 37243-1534**

February 19, 2008

Mr. Jerry Douglas Smith  
Rockcastle Development, LLC  
9980 Clay County Highway  
Moss, Tennessee 38575

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
RECEIPT #7006 0810 0000 1061 7207**

Subject: DIRECTOR'S ORDER NO. WPC08-0008  
ROCKCASTLE SUBDIVISION  
FENTRESS COUNTY, TENNESSEE

Dear Mr. Smith:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Mark Jordan at (615) 532-0675.

Sincerely,

Patrick N. Parker, Manager  
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Cookeville  
DWPC – Compliance File  
OGC

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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<b>IN THE MATTER OF:</b>	)	
	)	
<b>ROCKCASTLE DEVELOPMENT, LLC</b>	)	<b>DIVISION OF WATER</b>
	)	<b>POLLUTION CONTROL</b>
	)	
<b>RESPONDENT</b>	)	<b>CASE NUMBER WPC08-0008</b>
	)	

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**DIRECTOR'S ORDER AND ASSESSMENT**

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

**PARTIES**

**I.**

Paul E. Davis is the duly appointed director of the Tennessee Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

**II.**

Rockcastle Development, LLC, (hereinafter the "Respondent") is the owner/developer of Rockcastle Subdivision, a residential subdivision located adjacent to Glenobey Road in Fentress County (hereinafter the "site"). Service of process may be made on the Respondent through Jerry Douglas Smith, at 9980 Clay County Highway, Moss, Tennessee 38575.

**JURISDICTION**

**III.**

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred,

or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

#### IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

#### V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

#### VI.

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (hereinafter “ARAP”) that is not governed by a general permit or a § 401 Water Quality

Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

## VII.

Rockcastle Creek and the unnamed tributaries to Rockcastle Creek, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife. Additionally, Rockcastle Creek is listed as impaired for nutrients, low dissolved oxygen, thermal modifications and *escherichia coli* due to minor municipal point source and urbanized high-density area discharges.

## FACTS

## VIII.

On January 19, 2007, a NOI, SWPPP, and appropriate fee were submitted to the Cookeville Environmental Field Office (CK-EFO) by the Respondent, requesting coverage under the TNCGP for construction activities in Phase I of the site. The NOI showed Mr. Jerry Douglas Smith as owner/developer and Rockcastle Development, LLC, as the primary contractor. Mr. Doug England signed the NOI as representative of the owner/developer and as the representative of the primary contractor. The division issued coverage under the TNCGP on February 21, 2007.

## **IX.**

On September 4, 2007 and September 7, 2007, the division received complaints regarding construction activities at the site.

## **X.**

On September 14, 2007, division personnel from the CK-EFO conducted a complaint investigation and noted that the Erosion Prevention and Sediment Control (EPSC) measures along the roadways in Phase I were inadequate in retaining sediment on site. Large portions of the cut and fill slopes associated with road construction were unstable, allowing sediment to migrate off site. No stabilization measures had been installed in the roadside ditches and numerous culverts lacked inlet and outlet protection.

## **XI.**

On October 2, 2007, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the September 14, 2007, complaint investigation. The Respondent was instructed to immediately install EPSC measures to prevent additional sediment loss from the site and was further instructed to submit a response to the division by October 16, 2007, detailing the methods utilized to stabilize the site.

## **XII.**

On October 15, 2007, the division received a request for an extension until October 23, 2007, to comply with the October 2, 2007, NOV requirements. The extension request was made on behalf of the Respondent by Field Engineering Consulting Services. The division granted an extension until October 29, 2007.

### **XIII.**

On October 20, 2007, the division received a response to the October 2, 2007, NOV, which included photographs, along with a written explanation of the measures implemented at the site.

### **XIV.**

On October 30, 2007, the Respondent submitted an NOI, SWPPP and appropriate fee requesting coverage under the TNCGP for construction activities in Phases II – IV of the site. Also included was an ARAP application for 44 minor road crossings within Phases II - IV. Division personnel determined the SWPPP was deficient and, in correspondence dated November 9, 2007, informed the Respondent of the deficiencies and requested the submittal of a complete SWPPP prior to issuance of coverage under the TNCGP.

### **XV.**

On November 19, 2007, the division issued Expedited Directors Order WPC07-0252 to the Respondent for the violations noted during the September 14, 2007, complaint investigation. The Order assessed a Civil Penalty in the amount of \$2,000.00 (TWO THOUSAND DOLLARS). The Respondent acknowledged receipt of the Order on November 20, 2007.

### **XVI.**

On November 29, 2007, division personnel conducted an inspection in Phase I of the site to determine compliance with the requirements of the NOV and the TNCGP and to observe the preconstruction conditions in Phases II – IV. Division personnel noted some improvement in the

EPSC measures in Phase I. In Phases II – IV, division personnel noted that construction activities including road grading, construction of numerous minor road crossings over the unnamed tributaries to Rockcastle Creek, and cut/fill operations were underway. EPSC measures had been installed along the areas of road construction but were inadequate in retaining sediment on site. The culvert inlets and outlets of the minor road crossings were in need of stabilization and the minor road crossings lacked adequate EPSC measures, allowing sediment to migrate into the unnamed tributaries Rockcastle Creek. Additionally, division personnel noted heavy equipment tracks crossing Rockcastle Creek. The areas needing additional controls and existing controls that required maintenance were discussed on site with Mr. England. A subsequent file review determined that coverage under the TNCGP and written authorization under an appropriate ARAP for the activities noted in Phases II – IV had not been issued by the division.

## **XVII.**

On December 5, 2007, the division issued a NOV to the Respondent for the violations noted during the November 29, 2007, site inspection. The Respondent was instructed to submit a description of the methods to be utilized to stabilize the site and to submit a list of the road crossings that had been installed to that date. The Respondent was instructed to submit these documents by December 20, 2007.

## **XVIII.**

On December 18, 2007, the Respondent submitted a response stating that approximately fifty percent of the corrective measures discussed during the November 29, 2007, site inspection had been completed and that Fields Engineering Consultant Services had been instructed to

submit a description of the stabilization methods and a list of road crossings that had been constructed.

#### **XIX.**

On December 20, 2007, Fields Engineering Consultant Services submitted a description of the stabilization measures implemented at the site, as well as a list of all minor road crossings that had been constructed. Specifically, the response indicated that all inlets and outlets of road crossing culverts would be armored with non-erodible stone, areas of stream bank disturbance would be armored with non-erodible stone, rock check dams would be constructed in roadside ditches, and all disturbed areas would be stabilized by seeding and mulching as weather permitted. The list of minor road crossings indicated that 13 of 44 planned crossings had been constructed.

#### **XX.**

On December 26, 2007, the Respondent submitted payment in the amount of \$1,000.00 (ONE THOUSAND DOLLARS) along with the Waiver of Right to Appeal, agreeing to a fifty percent reduction in the assessed civil penalty, in response to Expedited Directors Order WPC07-0252. The balance of the civil penalty was to be paid to the division if, and only if, another NOV was issued by the division within the twelve-month period immediately following issuance of Expedited Directors Order WPC07-0252.

#### **XXI.**

On January 2, 2008, the division issued correspondence confirming receipt of the documents requested by the December 5, 2007, NOV. The Respondent was informed that



division personnel would conduct a site visit before January 31, 2007, in order to review the EPSC measures.

## **XXII.**

On January 3, 2008, the division issued coverage under the TNCGP for construction activities within Phases II – IV, as well as written authorization for the construction of the minor road crossings outlined in the December 20, 2007, submittal.

## **XXIII.**

On January 29, 2008, division personnel conducted a site inspection and noted that improvements to the EPSC measures in Phase I, as well as Phases II – IV, had been made. Division personnel determined that ten of the minor road crossings constructed to that date were on waters of the state and that the EPSC measures at these crossings were inadequate, in need of maintenance and that eroded material was migrating from these crossings into the unnamed tributaries to Rockcastle Creek. Additionally, division personnel noted that a large fill slope adjacent to ARAP #26 was failing, allowing eroded material to migrate into an unnamed tributary to Rockcastle Creek. Division personnel additionally noted that heavy equipment was continuing to be driven across Rockcastle Creek.

## **VIOLATIONS**

## **XXIV.**

By conducting land disturbance activities without coverage under the TNCGP and by altering waters of the state without authorization under an ARAP, the Respondent has violated T.C.A. §§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

**ORDER AND ASSESSMENT**

**XXV.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following Order and Assessment to the Respondent:

1. The Respondent shall, within 7 days of receipt of this Order and Assessment, establish effective EPSC measures such that sediment is not allowed to leave the site or enter waters of the state. These measures shall be chosen and installed in accordance with the *Tennessee Erosion and Sediment Control Handbook*.
2. The Respondent shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the CK-EFO at 1221 South Willow Avenue, Cookeville, Tennessee 38506, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6<sup>th</sup> Floor L&C Annex, Nashville, Tennessee 37243-1534.
3. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
4. The Respondent shall, within 30 days of receipt of this Order and Assessment, provide adequate stabilization of all culvert inlets and outlets at the site and submit photographic documentation of culvert stabilization to the Water Pollution Control Manager in the CK-EFO at the address shown above in Item 2.
5. The Respondent shall pay a CIVIL PENALTY of TWENTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500.00) to the division, hereby ASSESSED to be paid as follows:

- a. The Respondent shall, within 30 days of entry of this Order and Assessment, pay a CIVIL PENALTY in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00).
- b. If the Respondent fails to comply with Part XXV, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
- c. If the Respondent fails to comply with Part XXV, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
- d. If the Respondent fails to comply with Part XXV item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
- e. If the Respondent fails to comply with Part XXV, item 4 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.

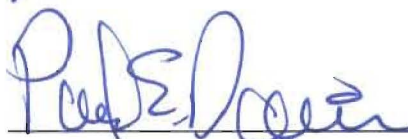
The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive

measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 19<sup>th</sup> day of February 2008.



Paul E. Davis, P.E.

Director, Division of Water Pollution Control

#### **NOTICE OF RIGHTS**

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243.